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ABSTRACT

This paper summarizes results of federal legislation and court litigation addressing special education issues. The first section considers cases in which rights were secured through litigation. These include rights of minority groups, rights of the mentally ill, rights of the mentally retarded, and the right to a fair classification. The second section discusses specific cases concerned with the right to education especially the Pennsylvania Association for Retarded Children versus the Commonwealth of Pennsylvania case. Litigation about aspects of Public Law 94-142, the Education for All Handicapped Children Act, is reviewed next including issues of prior legislation, specific provisions, and parent rights. Clarifications of succeeding legislation (e.g., P.L. 98-199, P.L. 99-457, and P.L. 101-476) are briefly summarized. Legislation specifically addressing vocational rehabilitation and developmental disabilities is considered next. Finally post P.L. 94-142 issues are discussed. These include: student removal; private school placement; related services (transportation, medically related services, and other services); the extended school year; attorney fees; and communicable diseases. Cases and statutes are listed at the end in tabular form. (11 references) (DB)

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SPECIAL EDUCATION AND THE LAW

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SPECIAL EDUCATION AND THE LAW

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Securing Rights Through Litigation

People with handicaps are often thought of as being different from their nonhandicapped peers. Ignorance and fear have led to discriminatory treatment, forcing exceptional individuals to go to court and engage in litigation to secure their rights. Litigation may be thought of as an adversarial proceeding in which two parties argue the respective merits of their cases in court. On each issue litigated, one party wins and one party loses. The purpose of the judiciary is to referee court proceedings and in the absence of a jury, to render a decision on each issue based on the arguments presented. Statements of fact are distinguished from conclusions of law. Once the facts are determined, law can be applied. Frequently litigated issues center on the rights people enjoy as citizens. These rights are found in the constitution and in statutory law, i.e., laws made by legislatures such as the United States Congress. Citizen rights are often called civil rights. No matter who is in charge of the government, these rights are guaranteed. In the United States, citizens have (among others) the right to be free from involuntary servitude (13th Amendment), the right not to be deprived of life, liberty, or property without due process of law (5th and 14th Amendments), the right of equal protection (i.e., nondiscriminatory treatment) under the law (14th Amendment), and the right to confidentiality of certain records (the Family Rights and Privacy Act of 1974, known as the Buckley Amendment, P.L. 93-380).

Civil rights have sometimes been denied to certain groups of citizens, such as African-Americans, the mentally ill, and school-aged children with handicapping conditions. When the group in question is part of a larger class of people whose rights are already assured, a class action suit may be filed. Decisions rendered in class action suits apply to all people in the class. In prior class action litigation, it was found that in the eyes of the law, African-Americans were not distinguishable from Anglos, the mentally ill could not be denied certain rights because they were confined to institutions, and that if schools provided educational services to nonhandicapped students, services must also be provided to students with handicapping conditions.

Minority Rights

Securing civil rights through litigation is often a time consuming process. It took African-American citizens over half a century to convince the courts that they were the unfair victims of discriminatory practices. In 1896, the Supreme Court ruled in Plessy v. Ferguson that separate but equal facilities for African-Americans were legally acceptable. It was not until 1954 that the Supreme Court in Brown v. Board of Education ruled that separate facilities for African Americans were inherently unequal.

The successful litigants used Section I of the 14th Amendment, which states:

"All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In constructing their cases, advocates for African-American citizens argued that there was no rational basis for dividing citizens into multiple classes on the basis of race. Differential treatment based on race, therefore, denied some citizens the equal protection of the law, a violation of the 14th Amendment.

Rights of the Mentally Ill

After the Brown v. Board of Education decision in 1954, many felt the legal climate was such that civil rights for other groups could be secured. Advocates for the mentally ill studied the arguments used by racial minorities before filing suit. Rather than relying solely on the equal protection clause of the 14th Amendment, they also utilized the amendment's due process provisions for relief.

When mentally ill people are institutionalized, their rights to liberty are abridged. The 14th Amendment states that a person may be deprived of liberty, but only if due process of law is followed. Counsel argued that due process was not being followed in many cases. Specifically, a person who is thought to be mentally ill to the point that institutionalization is required gives up his or her liberty so that treatment may be given. The person exchanges liberty for treatment. If liberty is surrendered and treatment is not provided, the person's substantive due process rights are violated. Due process does not have a fixed meaning in law, but may be thought of as "fair play." Substantive due process allows citizens to be treated differently, but fairly. Procedural due process requires that the rules or procedures established to deal with a given situation be followed. Advocates for the mentally ill argued that their clients who were confined without treatment were victims of substantive due process violations. If one is confined for the purpose of treatment and then denied that treatment, "the hospital is transformed into a penitentiary where one could be held indefinitely for no convicted offense" (Ragsdale v. Overholser, 1960).

In Nason v. Superintendent of Bridgewater State Hospital (1968), the judgment was in part: "...without affording them (the patients) reasonable treatment ...(institutionalization) raises serious questions of deprivation of liberty without due process of law." A very persuasive item of evidence in the Bridgewater case was the 1966 documentary film, Titicut Follies. It depicted nude men being tormented by Bridgewater hospital staff. The film was banned from showing until 1991 because it was ruled an invasion of the privacy of the patients. The outcome of these cases is that if one is confined to an institution for the mentally ill, treatment

must be given.

The Mentally Retarded

In Wyatt v. Stickney (1971), the court declared that: "No viable distinction can be made between the mentally ill and the mentally retarded." This means that mentally retarded people can not be confined to institutions without due process of law and that, once confined, the mentally retarded must receive treatment as a substantive due process right. The court ruled in this case that treatment consists of three elements: (1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment, and (3) individualized treatment plans. When the defendent pointed out that the State could not afford to provide adequate treatment for its residents, the court ruled that fiscal restraint is not a defense for inadequate care. This opinion was supported in other cases, including Hoosier v. Evans (1970).

Another issue addressed in cases involving the mentally retarded is consent. It can be argued that the retarded person or his or her guardian or parents may in some cases not be able to consent to institutionalization or other proposals. Legally to have consent, three conditions must be fulfilled:

1. Capacity. The person must have the mental faculty to acquire knowledge and make rational decisions. Some mentally retarded people do not meet the requirements for capacity.
2. Information. The proposed plan must be presented to the individual or his or her guardians in such a way that it can be fully understood and, in fact, is fully understood. With the mentally retarded, the conditions of information and capacity are often related.
3. Voluntariness. The law presumes that a person has acted voluntarily until it has been shown that he or she did not. Voluntariness is the ability to exercise free power of choice without force, fraud, deceit, duress, over-reaching, or other constraint or coercion. In many cases, fiscal constraint or inconvenience forces parents or guardians to decide in favor of proposals which may not be in the best interests of the affected person.

Consent became an issue as a direct result of societal concern over the way some mentally retarded and mentally ill people were treated. Through the first half of the twentieth century, some mentally retarded and mentally ill people were thought to be dangerous to themselves or others. This attitude generated apprehension and led officials to invoke the police power of the state doctrine in dealing with these groups. The police power doctrine provides that the States are obligated to protect the health, safety, and morals of its citizens. In the latter half of the twentieth century, mentally retarded and mentally ill people began to be viewed as incompetents who needed help. A change in legal attitude allowed the **parens patriae** (i.e., father protector) doctrine to be used in cases involving incompetence. Parens patriae requires that the person who makes decisions for the incompetent client must be an advocate who acts in the best

interests of the client. The courts began to decide consent cases by considering what the person would do if he or she were competent.

Three cases illustrate this change. In Strunk v. Strunk (1969), the court ruled that it had the power to permit removal of a kidney from an incompetent donor for purposes of effectuating a transplant. The court, acting as an advocate, substituted its judgment for that of the incompetent person, acting for him as it believed he would have acted if he were capable of reason. Three reasons for permitting the transplant were cited:

1. The incompetent person had an IQ of 35 and was very attached to the recipient, who was his brother. Expert testimony indicated that the brother's death would be psychologically detrimental.
2. The chance of success was very great because of the sibling relationship.
3. There was only minimal risk to the donor.

In Frazier v. Levi (1969), the issue was sterilization. A guardian sought a court order to get a ward of the State sterilized. The ward was thirty-four years of age, had the mental capacity of a six-year old, was unable to take care of herself, was sexually promiscuous, and was healthy. She was the mother of two children, both of whom were mentally retarded. Both children were being raised by the ward's aged parents, who lacked the financial, physical, and emotional resources necessary to adequately care for the children. The court denied the petition for sterilization because no State statute authorized the procedure. In this case the court was very conscious of the principle that legal rights must be carefully protected and not taken away without due process of law. Because no statute existed to permit sterilization, the court protected the ward's right not to be sterilized.

In Halderman v. Pennhurst (1978), twelve residents of Pennhurst State School and Hospital demanded habilitation in their own communities. They alleged that they lived in inhumane and dangerous conditions, were given unnecessary and dangerous medication, were subjected to unnecessary physical restraints, were consigned to lives of idleness because of a lack of habilitative programs, and were subjected to numerous physical injuries resulting from a lack of adequate supervision. In sum, they argued that institutionalization creates an environment so restrictive that life skills already learned may be lost. To establish this argument, plaintiffs relied on experts who stated that institutional settings make it extremely difficult to simulate normal environments. Since the purpose of institutions was to help its residents cope better with normal life, it is illogical to assume that a non-normal environment can best accomplish that end. Because habilitation cannot be provided in the institutional setting, the setting should be changed to fulfill the due process expectations of treatment. The court agreed that the best alternative for most residents was to replace institutional care with community-based services, including community living arrangements.

Right to a Fair Classification

During the school-aged years, a child must be classified as exceptional before special education services may be provided. Students are differentially diagnosed as educable mentally retarded, gifted, learning disabled, normal, or whatever after a referral is made, a battery of tests is administered, other information is collected, and the results evaluated. Currently, test instruments must be selected so as to be free from racial or cultural bias, procedures must be administered in the native language of the child, and no single procedure shall be the sole criterion for programming decisions (20 USC 1412). These safeguards were legislated after a number of questionable placement practices were revealed in landmark court cases.

In 1967, Hobsen v. Hansen was decided. The Washington, D.C. schools were like many others in that there was a significantly greater percentage of poor and African-American children in the special education and lower tracks. There was also a significantly lower percentage of poor and African-American students in the upper or college-bound tracks. It was argued that this deprived poor and African-American pupils of the right to an education equal to that afforded Anglo, more affluent students.

The rationale has to do with constitutional guarantees of the right to pursue life, liberty, and property. Education is thought to play a crucial role in this pursuit. The better one's education, the better one's chances for success, i.e., the ability to attain a happier life. Special education is designed to improve the life chances for exceptional students, but because of its mission, does not ordinarily serve to meet the needs of normally functioning students as well as regular education. If misplaced in either regular or special education, students' equal protection rights to pursue life, liberty, and property are in danger of being eroded.

The plaintiffs in Hobson v. Hansen successfully argued that tests based on Anglo, middle class norms were used to make placement decisions. Evidence presented supported the position that tests based on those norms led to incorrect placement of non-middle class and/or nonwhite students in classes for the handicapped. It was also demonstrated that movement among tracks was highly restricted. The court ordered the abolition of tracking, but did not invalidate ability grouping as such. It was thought that correct placement could be obtained if sufficiently sophisticated instruments were used.

The difficulty of this precedent setting case was compounded by constitutional provisions which did not guarantee equal protection outside the States. Washington, D.C. is not a State and the equal protection clause of the 14th Amendment refers specifically to States. Plaintiffs argued that the due process clause of the 5th Amendment, which is not limited to States, was broad enough to include equal protection provisions. The court agreed, making possible the finding in this case that the plaintiffs were denied equal educational opportunity (equal protection applied to public school education.

The Stewart v. Phillips (1970) case was also a class action suit in which it was alleged that some African-American students in Boston were denied the right to be educated in the regular classroom. Plaintiffs contended that placement into special education was made on the basis of tests which did not accurately measure the learning ability of the students, that those students were then denied educational programs designed for their specific needs, and that the parents were never given an opportunity to be heard in the placement process.

In this suit, plantiffs were careful to construct a persuasive case for correct placement by illustrating what could happen when a student was incorrectly placed in a class for the mentally retarded. A student was isolated in the placement from normal school experiences and rejected by both adults and other students. Those who dealt with the student expected behavior different from the norm. These stereotyped expectations of behavior led to the self-fulfilling prophecy of those expectations. Because the student displayed similar behaviors to those exhibited by retarded students, the placement became, in effect, permanent. This violated the child's equal protection rights. He was treated differently with regard to children who were correctly placed.

This case was stayed (not decided) because the Massachusetts legislature was considering a statute which addressed the issue of incorrect placement. The court, rather than render a decision which might be in conflict with the expected legislation, decided to wait for the new law to be passed. This case was used to spur the passage of legislation which protected the rights of children referred for special education services.

In the Larry P. v. Riles (1972) case, six African-American children from San Francisco were placed in classes for the mentally retarded soley on the basis of their scores on intelligence (IQ) tests. The plaintiffs contended that the students were wrongfully placed because the procedures used failed to recognize the fact that the students were unfamiliar with the Anglo middle class culture used to norm the tests. In addition, the plaintiffs claimed that the learning experiences the students received in their homes were not taken into consideration. The plaintiffs argued that these discriminatory actions violated equal protection clauses contained in the 14th Amendment and the California State Constitution. Violations of Title VI of the Civil Rights Act of 1964, Section 504 Of P.L. 93-112, and P.L. 94-142 were also alleged.

To prove unequal treatment (discrimination), evidence was presented which reinforced the allegation that the tests used for placement were culturally biased. Additionally, the plaintiffs argued that incorrect placement in classes for the mentally retarded led to stigmatizing effects which resulted in a life sentence of illiteracy and public dependency. Finally, the plaintiffs presented evidence of disproportionate placement. In San Francisco, 29% of the students were African American, but 66% of children in classes for the mentally retarded were African-American. In the State of California, 9% of the student population were African-American, but 28% of the students in classes for the

mentally retarded were African-American.

After presenting this information, the plaintiffs said that they proved racial disparity and that it was up to the school system to justify this discrimination or stop using IQ tests to place students in classes for the handicapped. Ordinarily it is up to the plaintiffs to accept the whole burden of proof. In certain cases involving job discrimination, however, it is up to the defendant to prove that discrimination is not taking place. The court ruled that this case was like the job discrimination cases to the extent that the schools had to prove that they were not using discriminatory practices. This was difficult because of three points:

1. The classification system used seemed discriminatory.
2. Institutions have a positive duty to avoid racial imbalance.
3. Intelligence is distributed randomly, i.e., no race is superior or inferior to another.

After all the arguments were presented, the court decided that too great an emphasis was placed on IQ scores. This resulted in such disproportionality in public school classes for the mildly or educable mentally retarded (EMR) as to constitute a denial of equal protection. To remediate this discrimination, all students already placed in classes for the mentally retarded had to be reevaluated and the reevaluation had to be fair. Districts were ordered to maintain data on racial breakdowns in EMR classes and correct disproportionate enrollments. IQ tests must not be administered to African-American students and if already administered, must not be used in any placement decisions. With appeals, this case was not finally decided until 1986, some 14 years after first being filed.

In LeBanks v. Spears (1973), eight African-American children were incorrectly classified as educable mentally retarded after being assessed with biased tests. This denied them the right to an equal educational opportunity as guaranteed by the due process and equal protection clauses of the 14th Amendment. The court reiterated that all mentally retarded students were granted the right to an appropriate program of free public education and that each student who was mentally retarded or suspected of being mentally retarded was entitled to:

> "(a) evaluation and development of a special education plan and periodic review
> (b) provision of a free public program of education and training appropriate to his age and mental status."

One of the problems of litigating student issues is time. Often, cases drag on for so long that students have graduated or are no longer in school when the decision is rendered. In this case, the students had become adults. Instead of ending the litigation with a hollow victory, the court ordered that the schools had to fund compensatory education for these adults who had been without education as children. Another noteworthy action of this court was to make the following statement:

> "Placement in regular public school class with the

appropriate support services is preferable to placement in special public school class and placement in a special public school class is preferable to placement in a community training facility and placement in a community training facility is preferable to placement in a residential institution or other program of education outside the Orleans Parish Public Schools."

This statement reflects the concept of least restrictive environment as later used in P.L. 94-142.

Through the 1960's, it was common practice to administer tests to all students in English. This led to incorrect classifications for students who did not understand English well. The Diana v. State Board of Education (1970) case involved nine students who were placed in classes for the educable mentally retarded because of scores earned on the Stanford-Binet or Wechsler intelligence tests. All came from homes in which the predominant language was Spanish. Diana's IQ score was 30. When retested by a bilingual psychologist, she scored 79. At that time the cut-off score in California for mental retardation was 75. Each of the other eight children also scored above the cut-off point when retested by a bilingual psychologist. In this case an out of court settlement was reached. It involved changing the California School Code with regard to assessment and placement of students in programs for the educable mentally retarded.

Ruiz v. State Board of Education (1971) was another class action suit dealing with IQ testing. The issue included group IQ testing, which is generally considered less accurate for placement than individually administered tests of intelligence. This case strengthened the commitment to native language testing in California.

Guadalupe v. Tempe (1972) was an Arizona case in which Spanish speaking children were evaluated in English and incorrectly classified as educable mentally retarded or trainable mentally retarded. The court ordered that past practices be corrected by reevaluating all educable mentally retarded and trainable mentally retarded students whose primary language was other than English. To insure fair practices in the future, the court ordered that some combination of three procedures be followed in evaluating children when the chief school administrator determines that a child's language is other than English. These procedures are to: (a) use a psychologist fluent in both the child's primary language and English, (b) use an interpreter to assist the psychologist both with language and testing, and (c) use test instruments which do not stress spoken language and which are considered valid and reliable performance measures of intellectual functioning such as the Wechsler Performance Scales. Other stipulations provided for communication to parents in their primary language, a complete evaluation, and a team approach in evaluation. Explanations to the parents must be made in their primary language prior to placement. No special education placements can be made until:

"an examination of developmental history, cultural background, and school achievement substantiates

other findings of educational handicap. This examination shall include estimates of adaptive behavior. Such examinations of adaptive behavior shall include, but not be limited to, a visit, to the child's home by an appropriate professional social worker or school nurse, and interviews of members of the child's family at their home. If the language spoken in the home is other than English, such interviews shall be conducted in the language of the home."

Placement cannot be made without a recommendation by the evaluation team. It must be composed of a parent or guardian of the child, the school principal, a person responsible for administering or conducting special education courses, a teacher who currently has been instructing the child, and an appropriate professional advisor. Provisions such as this were later used to construct due process stipulations in P.L. 94-142.

Right To Education

Prior to the 1970's, it was common practice to refuse public school admission to children who were not toilet trained, who had not reached the mental age of five, who could potentially disrupt the orderly operation of the classroom, or who exhibited medical problems. In 1971, these policies were challenged in Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania. This case is commonly referred to as the PARC case.

PARC

Glenn Lowery, a child classified as mentally retarded, was one of the petitioners in this class action suit. In 1970, he was seven years old and was informed by the Susquehanna County School District that he could not attend school because he had not yet attained the mental age of five. A contributing factor in his rejection was that he was not toilet trained. His parents were told to bring him back when he was eight years old for further testing. In September of 1970, Glenn started attending the Developmental Day Program run by United Cerebral Palsy of Lackawanna County in Scranton. This necessitated a forty mile round trip each day. In spite of this excessive travel, Glenn was able to master toileting skills and improve his communication skills. Parents of children like Glenn then filed suit, claiming that the schools violated the equal protection clause of the 14th Amendment, the due process clause of the 14th Amendment, and the laws of the Commonwealth of Pennsylvania.

In establishing their case, the parents asked the court to consider six sections of the Pennsylvania Public School Code in five categories. The categories are as follows:

1. Attendance. Section 13-1301 stated that every child between ages six and 21 may attend public school. Section 13-1326 mandated compulsory school attendance from ages eight to 17. The parents argued that education is necessary for good citizenship, normal adjustment, and success in life. Pennsylvania has recognized these needs and, therefore, must

provide the opportunity of education to all on equal terms.

2. Exceptional Children. Section 13-1372 reflects the responsibility of Pennsylvania to provide proper education and training for all exceptional children. In 1971, less than half of the retarded children in Pennsylvania were being served in the public schools. Expert testimony established the fact that all retarded children could benefit from educational services.

3. Exclusion. Section 13-1375 required the State Board of Education to establish standards for exclusion from the public schools if those mentally retarded students were uneducable and untrainable. Mentally retarded students who were educable and trainable could stay. School psychologists were responsible for that determination. Those children labeled uneducable and untrainable were turned over to the Department of Public Welfare, which had no obligation to educate. Determinations could not be challenged because there were no due process provisions included in this section. Parents pointed out that this violated the due process clause of the 14th Amendment. They also argued that the assumption that certain mentally retarded children were uneducable and untrainable lacks a rational basis in fact and is, therefore, discriminatory, a violation of the equal protection clause of the 14th Amendment. Another equal protection argument had to do with wealth. Only the affluent parents of excluded students could afford to pay tuition at nonpublic schools. Wealth is not a permissible criterion for education and services should not be denied to children whose parents are poor. Finally, it was pointed out that the parents of excluded children were required to pay taxes in support of public education services denied to their children. This is obviously discriminatory.

4. Admission. Section 13-1304 stated that any child not having attained a mental age of five could be refused admission by the school districts. This conflicts with the attendance provisions in sections 13-1301 and 13-1326. Because there is no rational basis in fact for denying a public education to some mentally retarded children who have attained the chronological age of six, this section violates the equal protection clause of the 14th Amendment. this denial of services when they can have the most beneficial effect upon a child's capacity for self-sufficiency and self-care is unfair, a denial of due process rights guaranteed in the 14th Amendment. Finally, the parents reiterated earlier arguments regarding denial of educational services based on wealth and the taxation of parents for services in which their children could not participate.

5. Excusal. Section 13-1330 provided that a child who has been found unable to profit from further public school attendance may be excused. In practice this section is used to exclude students. Excusal is the forgiving of nonattendance which a parent might mandate. Exclusion mandates nonattendance and may be contrary to a parent's wishes. Testimony by expert witnesses established the fact that every child was able to profit from properly designed and delivered intervention. No basis in fact existed to support exclusion, a violation of equal protection.

The parents petitioned the courts to enjoin or prohibit

the schools from enforcing discriminatory exclusion practices, denying admission to the public schools to any retarded child of school age, and otherwise giving differential treatment concerning attendance at school to any retarded child. In cases involving discrimination, the courts have used two standards to judge whether equal protection rights have been violated. The less stringent standard is called the rational basis judgment. If the answer to two questions is yes, the court will rule that equal protection rights have not been violated. The first question is, Are the ends or purposes legitimate State purposes? The second question is, Is there a rational relationship between the ends or purposes and the particular classification? In the PARC case, the court could have asked if the practice of categorizing mentally retarded children into one class called educable and trainable and another class called uneducable and untrainable made sense. If the categories did make sense, i.e., they had a rational basis in fact, then the practice of exclusion by the schools as practiced in 1970 would be permissible. Parents in this case argued that there was no basis in fact for what they called arbitrary and capricious categories.

The second standard used to judge possible equal protection violations is more stringent and is called strict scrutiny. It is the responsibility of the State to demonstrate a compelling or fundamental interest in the discriminatory practice if the court uses the strict scrutiny standard. Strict scrutiny is employed when questions of fundamental rights guaranteed by the Constitution (e.g., voting, marriage, travel) arise or when constitutionally suspect criteria (e.g., race or nationality) are used as the basis of classification. In addition, the State must prove that the discrimination was necessary and not just convenient.

In this case, the court leaned toward the strict scrutiny approach when it discussed the highly suspect State program which could separate the mentally retarded into two categories. Before the case reached judgment, the parties settled by consent. Pennsylvania argeed to provide a free, public program of education and training appropriate to the child's capacity. All children from ages six to 21 would be included. The Department of Public Welfare was ordered to provide appropriate education and training to its charges to insure that all children would receive educational services. A child who was refused placement in a regular primary school could not be refused placement in a special primary school. Finally, only the parent may elect to withdraw a child from school and only a parent may keep a child out of school before age eight and after age 17.

Other cases

A consent agreement is legally less persuasive than a judicial decree. The Mills v. Board of Education of the District of Columbia (1972) case more firmly established that handicapped children had a right to education. In this case, the decree also expanded the umbrella of coverage to include handicapped children other than the mentally retarded. Seven

students alleged that the District of Columbia failed to provide publicly supported education to exceptional children or excluded, suspended, expelled, reassigned, and transferred exceptional children from regular public school classes without affording them due process of law. They claimed that they could profit from regular education with support or special education. These children were labeled as behavior problems, mentally retarded, emotionally disturbed, or hyperactive.

The court was asked to examine the District of Columbia Code. Section 13-201 stated that every child between the ages of seven and sixteen must be in school and Section 31-203 stated that a child could be excused from school only when he or she could not profit from regular education, but that the child was then entitled to special services if he or she could benefit from them. By this time it was well established that experts believed that all children could profit from instruction. No one was surprised when the court ruled that education must be provided to all, that it was not permissible to take a child out of regular education unless a special education placement was available, and that the due process provisos of prior hearing and review must be completed before the child could be placed in special education.

Other cases supported and clarified the right to education for learners with handicapping conditions. In Maryland Association for Retarded Children v. Maryland (1974), the court decided that there was no difference between the terms education and training for purposes of granting relief to the mentally retarded. Education was defined as "any plan or structured program administered by competent persons that is designed to help individuals achieve their full potential." It is a fundamental interest. In re G. H. (1974), the school district was ordered to pay for a private school placement of a physically handicapped student when the district could not provide adequate services. In Lau v. Nichols (1974), the holding was that the San Francisco School District could not continue to teach students in English without teaching English to its Chinese speaking students or conducting classes for this group in the Chinese language. Plaintiffs relied on equal protection and due process, but also invoked Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112) and Section 601 of the Civil Rights Act of 1964. Section 504 states in part that

> "No otherwise qualified handicapped individual...shall...be excluded from...any program...receiving Federal financial assistance."

In Hairston v. Drosick (1976), the public schools refused to admit a mildly handicapped child because of spina bifida (a spinal lesion) and toileting problems. The parents never received any notice of the school decision. They sued, citing a violation of their due process rights under the 14th Amendment and incorrect denial of services under Section 504. This is indicative of the shift in litigation toward reliance on statutory law. It is much easier to construct a case showing a violation of statutory law than constitutional provisions.

Not all educational due process and equal protection arguments have met with unqualified success. In San Antonio Independent School District v. Rodriguez (1973), the court ruled that as long as education was adequate, equal protection is not violated if some districts spend less on education than others. The court refused to order Texas to equalize its educational spending. While not dealing directly with special education, this case is worthy of note in part because the court set the criteria for determining a suspect class as those "saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." In Fialkowski v. Shapp (1975), it was alleged that multihandicapped students in Pennsylvania were being denied an appropriate education. In their defense, the schools contended that no fundamental right to education existed. The court disagreed and distinguished this case from Rodriguez by stating that all students in Texas were receiving at least an adequate education while those multihandicapped students in Pennsylvania were not. This is a violation of their equal protection rights.

P.L. 94-142

Litigation of increasingly complex issues in the mid-1970's was placing burdens on all parties. In addition, rights secured in one jurisdiction often had to be litigated again in other jurisdictions, often with slightly different results. Court rulings supported the right of all students to be provided with an equal educational opportunity, but interpretations and implementation of this right varied. In 1975, litigation was proceeding in thirty-seven States in the area of securing the right to education for children with handicapping conditions. Clearly, a national policy was needed to reduce litigation and establish some uniformity in provision of educational services to students with handicapping conditions. Direct provision of those services, however, is forbidden by the United States Constitution. Unless a power is specifically granted to the federal government, it is reserved for the States (10th Amendment). In areas such as education, the federal government can only affect State policies by offering to support State efforts with grants and other fiscal inducements. To encourage the States to support the education of children with handicapping conditions, congress passed and President Ford signed the Education for All Handicapped Children Act (P.L. 94-142) into law in 1975.

Prior Legislation

P.L. 94-142 evolved from several statutes and was spurred by the amount of litigation previously discussed. P.L. 89-10, The Elementary and Secondary Education Act of 1965, contained provisions for disadvantaged children under Title I, the Education of Disadvantaged Children Act. P.L. 91-230 was the precursor to P.L. 94-142. It contained Title VI, the Education of the Handicapped Act of 1970. P.L. 93-

380, the Educational Amendments of 1974, provided the basic framework for P.L. 94-142 in Title VI-B, the Education of the Handicapped Amendments. Section 612 (d) (13) of P.L. 93-380 contains provisions for due process. Each State must develop a plan that will: "provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A) (i) prior notice to parents or guardians of the child when local or State educational agency proposes to change the educational placement of the child, (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child, (iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational educational agency involved in the education or care of children) to act as a surrogate for parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal."

Section 612 (d) (13B) contains provisions for least restrictive environment (LRE), including: "procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other health care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal or handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

P.L. 93-380 also contains the Family Rights and Privacy Act (Title V, Sections 513, 514). Also known as the Buckley Amendment, this provision gives parents accesss to records if their children are under 18 years of age. Records must be made available within 45 days of a request to view them. Individuals over age 18 have access to their records.

Provisions

P.L. 94-142 is primarily a funding law established in part to assist State and local efforts to provide programs to meet the educational needs of children with handicaps. Handicapped children are defined as "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, or children with specific learning disabilities, who by reason thereof require special education and related services" (20 USC 1401; 89 STAT. 775). The statute assures that an equal educational opportunity will be provided to children with handicaps by authorizing the federal government to pay up to 40 percent of the average per

pupil expenditure to help defray the excess costs involved in educating handicapped children. To meet this goal of providing education to handicapped children, the statute guarantees "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children" (89 STAT. 775).

A free appropriate public education (FAPE) means "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required..." (89 STAT. 775).

The individualized education program (IEP) is "a written statement for each handicapped child developed in any meeting by a representative of the local education agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which a child will be able to participate in regular educational programs, (D) the projected dates for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved" (89 STAT 776). The IEP will include only those areas in which the student receives special education, related services, or modified regular education.

P.L. 94-142 defines special education as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions" (89 STAT. 775).

Related services are defined as "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children" (89 STAT 775). The regulations established for P.L. 94-142 state that school health services, social work services in schools, and parent counseling and training fall

under the related services umbrella.

To insure that children are properly placed in special education classes and services, additional regulations about evaluation were put into effect. Evaluation is defined as "procedures used ... to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class" (Federal Register, August 23, 1977, p. 42494).

Further

"(a) Tests and other evaluation materials:
(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;
(2) Have been validated for the specific purpose for which they are used; and
(3) Are administered by trained personnel in conformance with the instructions provided by their producer;
(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;
(c) Tests are selected and sdministered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);
(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and
(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.
(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."

(Federal Register, 1977, pp. 42496-97)

Parent Rights

Abuse of parental rights before the litigation and legislation of the 1970's centered around due process violations. It was common practice in some districts not to inform parents that their children were being evaluated for special education placement. In some cases, parents were not

even informed that their children were placed into special education classes. To remedy these abuses, P.L. 94-142 and its regulations have strong provisions to insure that the rights of parents are protected.

It is the responsibility of each State to disseminate information to parents about their rights. The following is a list of parent rights in special education that was compiled from information disseminated by the Kansas State Department of Education, 120 East Tenth Street, Topeka, KS 66612, phone (913) 296-3866. Each State has similar information available.

1. Records
   A. Right to inspect and review records
   B. Right to make copies of records
   C. Right to be informed of all types and locations of records being collected, maintained, or used by the agency
   D. Right to ask for an explanation of any item in the records
   E. Right to ask for an amendment of any record on the grounds it is found inaccurate, misleading, or violates privacy rights
   F. Right to a hearing if the agency refuses to make the requested amendment
2. Independent Evaluation
   A. Right to an independent educational evaluation
   B. Right to have the independent evaluation considered when placement and program decisions are made
   C. Right to be told where an independent evaluation may be obtained at no expense or low expense
   D. Right to be told the procedures for obtaining an independent evaluation at public expense and the conditions under which such an evaluation may be obtained
3. Notice
   A. Right to notice before the agency initiates or changes (or refuses to initiate or change) the identification, evaluation, or placement of your child
   B. Right to have that notice in writing and in your native language or other principal mode of communication, at a level understandable to the general public (121
   C. Right to have the notice describe the proposed action, explain why it is proposed, describe the options considered, and explain why those other options were rejected
   D. Right to be notified of each evaluation procedure, test, record, or report the agency will use as a basis for any proposed action
4. Consent
   A. Right to consent or object before an evaluation is conducted and before initial placement is made in special education
   B. Right to revoke consent at any time

C. Right of the agency to proceed, in the absence of consent, to a hearing to determine if your child should be initially placed

D. Right of agency to initiate placement after 30 days if the parents fail to respond

5 Hearings

A. Right to request an impartial due process hearing to question the agency's identification, evaluation, or placement of your child or to question the agency's provision of a free appropriate public education

B. Right to have the hearing conducted by your local education agency

C. Right to be told of any free or low cost legal and other relevant services available (e.g., expert on handicapping conditions that may be a witness at the hearing)

D. Right to have the hearing chaired by a person not employed by a public agency involved in the education of your child or otherwise having any personal or professional interest in the hearing

E. Right to see a statement of the qualifications of the hearing officer

F. Right to be advised and accompanied at the hearing by counsel and to be accompanied by individuals with special knowledge of training in problems of handicapped

G. Right to have your child present

H. Right to have the hearing open to the public

I. Right to present evidence and confront, cross-examine, and compel the attendance of witnesses

J. Right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days before the hearing

K. Right to obtain written findings of fact and a written decision within 5 days after the local due process hearing has been completed

L. Right to appeal to the Kansas State Board of Education and receive a decision within 5 days after the review of the appeal

M. Right to have a hearing and an appeal set at a time reasonable convenient to the parent

O. Right to appeal a decision from the State Board of Education in court

P. Right to have your child remain in his or her present educational placement during the pendency of the administrative proceeding, unless parent and agency agree otherwise

6. Evaluation Procedures

A. Right to have a full and individual evaluation of your child's educational needs

B. Right to have more than one criterion used in determining an appropriate educational program for your child

C. Right to have the evaluation performed by a multidisciplinary team

D. Right to have your child assessed in all areas related to the suspected disability

E. Right to have a re-evaluation every three years or more frequently if conditions warrant or if you or your child's teachers requests it

7. Least Restrictive Environment
   A. Right to have your child educated with non-handicapped children to the maximum extent appropriate
   B. Right to have your child removed from the regular educational environment only after supplementary aids and services were tried and found unsatisfactory
   C. Right to have a continuum of alternative placements so that removal from the regular educational environment can be the least necessary deviation
   D. Right to have supplementary services such as resource room or itinerant instruction to make it possible for your child to remain in a regular class placement
   E. Right to have placement in the school your child would attend if non-handicapped unless the individual education program requires some other arrangement
   F. Right of your child to participate with non-handicapped children in nonacademic and extra-curricular services and activities such as meals, recess, counseling, clubs, athletics, and special interest groups

8. Confidentiality of Information
   A. Right to restrict access to your child's records by withholding consent to disclose records
   B. Right to be informed before information in your child's file is to be destroyed
   C. Right to be told to whom information has been disclosed

P.L. 94-142 has additional provisions not discussed here that have to do with administrative and fiscal stipulations. A summary of the major provisions of P.L. 94-142 follows:

* Child identification procedures
* Detailed State plans for compliance
* Programs for comprehensive personnel development
* Due process procedures
* Nondiscriminatory testing and evaluation
* Guarantee of a free appropriate public education
* An individualized program for all handicapped children
* Services provided in the least restrictive environment
* Consultation with parents or guardians
* A surrogate parent to act for any child as required
* Confidentiality of data and information.

Further explanation of any of these provisions may be found in the statute, its regulations, and the extensive body of literature and media available.

Succeeding Legislation

P.L. 94-142 has been clarified and expanded by succeeding legislation. P.L. 98-199, the Education of the

Handicapped Act Amendments of 1983, established a national advisory committee on the education of handicapped children and youth, provided grants for the removal of architectural barriers in accordance with P.L. 90-480, clarified policy for participation of handicapped children in private schools, amended procedures to evaluate the implementation of efforts to provide educational services to handicapped children and youth, established experimental preschool and early educational programs for handicapped children, strengthened secondary education and transitional services, provided funds for personnel training, and authorized funding for a variety of items. This is a typical example of a bill that contains multiple items.

P.L. 99-457, the Education of the Handicapped Act Amendments of 1986, established, in part, support for early intervention services for handicapped preschool children. Title I supported programs for developmentally delayed infants and toddlers (birth through age 2) and their families. These delays may occur in one or more of the following areas: physical development, cognitive development, language and speech development, psycho-social development, or self-help skills. Services include: family training, counseling, and home visits; special instruction; speech pathology and audiology; occupational therapy; physical therapy; psychological services; case management services; medical services only for diagnostic or evaluative purposes; early identification, screening, and assessment services; and health services necessary to enable the infant or toddler to benefit from the other early intervention services. These services are provided in conformity with an individualized family service plan, containing statements of the infant/toddler's present levels of development, the family's strengths and needs, major expected outcomes, specific early intervention services needed, projected dates for initiation of services and anticipated duration of services, the name of the case manager, and the steps to be taken supporting the transition of the handicapped toddler to other services.

Title II of P.L. 99-457 provides special education and related services to handicapped children aged 3 to 5. Definitions and provisions in this act are closely related to those in P.L. 94-142.

P.L. 101-476 redefined several terms. Autism and traumatic brain injury were added to the definition of children with handicapping conditions. Special education was redefined to include: instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. Related services was broadened by enlarging the term recreation to include therapeutic recreation and social work services and by enlarging the term counseling services to include rehabilitation counseling. A statement about transition services was added to the components of an individualized education program (IEP). Transition services are defined as

> " a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education,

vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. the coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experience, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational education." 104 STAT. 1103.

Handicapped infants, toddlers, children, and youth became infants, toddlers, children, and youth with disabilities. P.L. 101-476 reverses the June 15, 1989 Supreme Court Decision (Dellmuth v. Muth) that stated that children denied a free appropriate public education are not entitled to reimbursement by the State for tuition paid by their parents for placement in an appropriate program. Under this act, States are not immune under the 11th Amendment from suit for a violation of this act.

P.L. 94-142 and succeeding legislation are voluntary laws in which a State accepts federal monies to partially fund the excess cost of educating handicapped children while agreeing to meet conditions that the laws specify. A State does not have to participate in federal programs for the handicapped, but that does not absolve the State from providing education to children with handicapping conditions. The 14th Amendment and provisions of P.L. 93-112 (The Rehabilitation Act of 1973) guarantee a free appropriate public education.

Rehabilitation and Developmental Disabilities

When people with handicapping conditions are not being served by public school programs, they are eligible to be served by programs established by legislation other than P.L. 94-142 and its amendments. Two important areas are vocational rehabilitation and developmental disabilities.

Vocational Rehabilitation

The Rehabilitation Act of 1973 (P.L. 93-112) was originally intended to be applied to enhance the employability of those with handicapping conditions, but was expanded to include any public school programs that receive federal funding. In this statute, handicap is defined differently than in P.L. 94-142. A handicapped individual is anyone

"who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services ..." (87 STAT. 361).

The Rehabilitation Act Amendments of 1974 (P.L. 93-516) changed the definition to

"any person who (A) has a physical or mental

impairment which substantially limits one or more major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment."

While both of these are functional definitions, the latter expanded the scope of the definition to go beyond employment. This reflects a national commitment to end discrimination on the basis of handicapping conditions.

Several severe handicaps are included under this statute. A severe handicap is defined as

"the disability which requires multiple services over an extended period of time and results from amputation, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia and other spinal cord conditions, renal failure, respiratory or pulmonary dysfunction, and any other disability specified..." (87 STAT. 362).

Section 504 of P.L. 93-112 states that

"No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (87 STAT. 394).

Section 504 has actually been interpreted differently than stated. As stated, a blind bus driver, for example, could not be refused employment because he is qualified except for his handicapping condition. The provision is being interpreted as No person who is qualified in spite of a handicap... This is parallel to language expressed in Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and Title IX of the Education Amendments of 1972 (P.L. 92-318), which prohibits discrimination in education on the basis of sex.

The evaluation regulations of Section 504 (34 CFR Part 104) are identical with those of P.L. 94-142. When considered with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and their amendments, there is no mistaking that the intent of the federal government is to eliminate discrimination in American society on the basis of sex, race, or handicapping condition.

Developmental Disabilities

Developmental disabilities have been addressed in P.L. 91-517 (The Developmental Disabilities Services and Facilities Construction Act of 1970), P.L. 94-103 (The Developmentally Disabled Assistance and Bill of Rights Act of 1975), and P.L. 95-602 (The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978). P.L. 93-112 (The Rehabilitation Act of 1973) and P.L. 101-336 (The Americans with Disabilities Act of 1990) are closely related.

P.L. 95-602 defines developmental disability as

"a severe, chronic disability of a person which (A)

> is attributable to a mental or physical impairment or combination of mental and physical impairments; (B) is manifested before the person attains age twenty-two; (C) is likely to continue indefinitely; (D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and (E) reflects the person's need for a combination and sequence of special interdisciplinary, or generic care, treatment, or other services which are of the lifelong or extended duration and are individually planned and coordinated." 92 STAT. 3004.

The major disability groups include cerebral palsy, epilepsy, and mental retardation.

P.L. 101-336, The Americans with Disabilities Act of 1990, establishes a clear and comprehensive prohibition of discrimination on the basis of disability in private sector employment, public services, public accommodations, transportation, and telecommunications. The definition of disability is expanded to

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having an impairment" (104 STAT. 329).

For purposes of employment, qualified individuals with disabilities are those who, with or without reasonable accommodation, can perform the essential functions of the job. Employers with 15 or more employees may not discriminate against a qualified person with a disability in hiring and promotion. In the area of public services, the law states that

> "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" (42 USC 12132).

In public transportation, new or used vehicles bought by public entities must be accessable to persons with disabilities. Public accommodations and services operated by private entities (i.e., many retail establishments) may not refuse or exclude persons with disabilities. In telecommunications common carriers such as telephone companies must make services available to those who use telecommunication devices for the deaf (TDD) on a full time basis. In this act, the term disabilitiy shall not include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, compulsive kleptomania, compulsive pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.

Post P.L. 94-142 Issues

Since the advent of P.L. 94-142, there has been a shift in litigation from securing basic rights in education to defining and fine-tuning the implementation of rights now guaranteed by federal statute. Some notable loopholes have been found, as well as a lack of clarity in some areas. One area of import is the relationship between placement in specific services and development of the student's individualized educational program. In Spielberg v. Henrico County Public Schools (1987), the court ruled that placement can only be determined after an IEP is developed. Other litigation since 1975 has increasingly centered around the issues of student removal, other placement issues, related services, the extended school year, attorney fees, and communicable diseases.

Student Removal

Student suspension was addressed in 1975 in Goss v. Lopez. In general, students may not be suspended from school without notice and an opportunity for a fair hearing. The first case to be litigated under P.L. 94-142 was Mattie T. v. Holladay (1977). It was a class action suit brought on behalf of exceptional students who were excluded from school, inappropriately placed in self-contained special education classes which denied them contact with their nonhandicapped peers, or neglected in regular education classes. In addition to LRE issues, questions about due process in evaluation and review of district decisions were also raised. Plaintiffs used the antidiscrimination provision of Section 504 and the due process, fair classification, and least restrictive environment provisions of P.L. 94-142. The court confirmed that educational services must be provided and stated that if a long term student removal was involved, the district must call a multidisciplinary team meeting to determine where services should be provided.

In Stuart v. Nappi (1978), Howard S. v. Friendswood (1978), Doe v. Koger (1979), S-1 v. Turlington (1981), and Lamont X v. Quisenberry (1984), courts ruled that educational services for students with handicapping conditions could not automatically be terminated by expulsion. Because expulsion constitutes a change in placement, the due process provisions of P.L. 94-142 apply. This issue was further clarified in Kaelin v. Grubbs (1982), in which a 15 year old boy physically abused a teacher. The court said that students with handicaps are not immunized from disciplinary action by P.L. 94-142, P.L. 93-112 (Section 504), or case law. They may not, however, be expelled if their disruptive behavior is a manifestation of their handicapping condition. In Adams Central v. Deist (1983), the school district that illegally expelled a trainable mentally retarded student had to reimburse the parents for the cost of the child's private placement. Because the district did not meet procedural requirements, the student was deprived of his right to an education. The district is obligated to provide a free appropriate public education.

The issue of expulsion for handicapped students was also

addressed by the court in School Board v. Malone (1984). Jerry Malone, a learning disabled youth, acted as a "go-between" in several drug transactions. The court found that Jerry was ridiculed by his peers, leapt at the chance for peer approval, knew that his involvement in drug dealing was wrong, but was prevented by the handicapping condition from comprehending the consequences of his actions. Undesirable behavior of this type should lead to a more restrictive environment instead of expulsion. The court took a further step by saying that after a more restrictive environment was explored, it was possible to discipline the child. Jackson v. Franklin County (1985) did not contradict the earlier cases by saying that public schools unquestionably retain their authority to remove any student, handicapped or otherwise, who disrupts the educational process and poses a threat to a safe school environment. In Honig v. Doe (1988), the U.S. Supreme Court relied on P.L. 94-142 (20 USC 1413 (e) (2) and (3)) in stating that a disabled child shall remain in the current placement pending completion of any review procedures unless the parents and LEA agree otherwise. In addition, school authorities may rely on 20 USC 1415 (e) (2) and file suit for appropriate injunctive relief, but 1415 (e) (3) creates a presumption in favor of the child's current educational placement. In Board of Education of Township High School District No. 211 v. Corrall (1989), the court made the determination as to whether or not a student constituted a danger to himself or others.

It must be pointed out that established procedures must be followed. In a letter from the Office of Civil Rights to the Kansas State Department of Education in 1985, it was emphasized that P.L. 93-112 (Section 504) prohibits the suspension or expulsion of a handicapped student for ten days or more during a school year without determining whether the student's placement is still appropriate for his or her needs. This determination is made by a reevaluation as stated in a 1985 letter from the Office of Civil Rights to the Muscogee, Georgia, County School District. As of 1986, the position of the Office of Civil Rights of the Department of Education is that suspensions of more than 10 days constitutes a change in placement which triggers protections under Part B of the Education for All Handicapped Children Act (P.L. 94-142) and the corresponding regulations (34 CFR 300.504) regarding notice to parents.

In-school suspension is not treated differently than other types of suspension. The Office of Civil Rights in a 1986 letter to the Bethel, Washington, School District stated that the schools must follow proper due process procedures in the case of in-school suspension to insure that the student is not denied a free appropriate public education. Students must not be excluded from school participation or granted an unequal opportunity to participate on the basis of handicap. They cited 34 CFR 104.33, 104.35, and 104.4.

A summary of existing law indicates that the condition of handicap be taken into consideration in the event of a proposed suspension. The multidisciplinary team must determine if the handicapped student's disruptive behavior is a function of the handicap before the student can be dismissed from school for ten days or longer. If the

handicapping condition causes the disruptive behavior, a reevaluation by the multidisciplinary team is in order. If the disruptive behavior is not related to the handicapping condition, then the schools may follow procedures they have adopted for nonhandicapped students in disciplinary actions. School officials still retain the authority to control violent or antisocial behavior through temporary suspensions. Determinations must be made on a case by case basis.

Various courts have determined that disciplinary actions other than suspension may be used. Physically aversive techniques were upheld in Behavior Research Institute, Inc. v. Leonard (1986). Paddling, isolation, and mouth-taping were upheld in Cole v. Greenfield-Central Community Schools (1986). Restraints were upheld in Garland Independent School district v. Wilkes (1987). Time-outs were upheld in Dickens v. Johnson County Board of Education (1987) and Hayes v. Unified School District No. 377 (1987). In Honig v. Doe (1988), the court added study carrels, detention, and loss of privileges to the list of alternative disciplinary actions.

Private School Placement

Children with handicaps who are placed in private schools retain the right to receive special education services at public expense. In many cases, those services have been delivered on the premises of the private school. Two decisions which affect this practice were handed down by the Supreme Court in 1985. In both Grand Rapids v. Ball and Aguilar v. Felton, the court felt that the delivery of services in private schools violated the First Amendment provisions on separation of church and state. The rulings were generalized to special education.

In the Grand Rapids case, the public schools had been running two programs since the 1976-77 school year. Shared Time was a day program run in private schools in which the district provided remedial and enrichment mathematics, remedial and enrichment reading, art, music, and physical education. Community Education was an after school program in which the district leased space in private schools and hired private school teachers to teach arts and crafts, home economics, Spanish, gymnastics, yearbook production, Christmas arts and crafts, drama, newspaper, humanities, chess, model building, and nature appreciation. To determine whether these programs upheld the First Amendment separation of church and state proviso, the court used a three-part test:

1. Is the purpose of the program secular in nature?
2. Does the program have the effect of neither advancing nor inhibiting religion?
3. Does the program foster an excessive government entanglement with religion?

Shared Time and Community Education advanced religion in three ways:

1. State-paid teachers, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense.
2. The symbolic union of church and state inherent in

the provision of secular state-provided public instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public.

3. The programs subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

Using public funds in parochial schools violates the First Amendment separation of church and state doctrine. The court stated that the union of government and religion tends to destroy government and degrade religion.

The Aguilar case was similar. For nineteen years, the New York City Public schools furnished publicly employed teachers to religiously affiliated private schools to provide on-site supplemental reading, mathematics, English as a second language, and guidance services to educationally deprived children from low income families under provisions of Title I of the Elementary and Secondary Education Act of 1965 (P.L. 89-10) and Chapter 1 of the Education Consolidation and Improvement Act of 1981 (P.L. 97-35). It was found that this necessitated a great deal of administrative cooperation between the public and private schools in the areas of schedules, classroom assignments, solving problems which arose in program implementation, handling requests for additioal services, and dissemination of information regarding the program. In addition, it was found that placing public school teachers in religiously affiliated private schools required a monitoring system in which ongoing inspection was required to ensure the absence of a religious message from public school personnel. It was feared that the pervasively sectarian environment might unduly influence the public school teachers to inculcate religious values in students. The public monitoring system necessary to ensure the absence of a religious message required a permanent and pervasive governmental presence. Administrative cooperation and procedures designed to prevent the advancement of religion entangled church and state to the point that the Entanglement Clause of the First Amendment was violated. The court ruled that Chapter 1 services must be provided, but away from the religiously affiliated schools. This ruling is important for special education because the same prohibition of on-site services applies. Starting with the 1985-86 school year, special education services can only be provided at a neutral site, i.e., one free from religious influence.

Related Services

P.L. 94-142 lists related services as "transportation, and such developmental services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping

conditions in children."

Litigation has clarified the meaning and scope of related services in the areas of transportation, medically related services, and counseling.

Transportation. In Hurry v. Jones (1984), the parents of a physically and mentally handicapped child assumed responsibility for transporting their child to and from school when school district personnel stated it was impossible for the district to provide safe transportation. When the father's work schedule made it impossible for the parents to continue transportation, the child stopped attending school. The court ruled that it was the responsibility of the school to provide transportation to and from the approved placement. Transportation includes getting the child from home to the bus and from the bus to the classroom. In Kennedy v. Board of Education (1985), the court ordered the board to provide transportation for two spina bifida children who could not get to the bus stop. When the district argued that the road to their houses was poorly maintained, the court looked at the decision in Shrewsbury v. Board of Education (1980). They ruled that if the road is unsafe for a large school bus, the district may have to purchase a smaller vehicle because the schools are responsible for transportation.

When a district places a child in a special purpose residential school, the district is obligated to provide transportation to and from the school. Included in the letter from the Office of Civil Rights to the San Antonio Independent School District in 1984 was the statement that the district is obligated to provide trips for regularly scheduled holidays if the students are expected to leave the campus. In 1986, OCR found that the Richmond County (Ga.) School District had to provide transportation on weekends for a student enrolled at a school 122 miles away under the provisions of Section 504 (34 CFR 104.33 (c) (1) and (2)). The placement, Georgia Academy for the Blind, did not provide programs on weekends and the district provided transportation for all students who lived 1 and 1/2 miles or more from their schools.

In a letter from the Office of Civil Rights to the Chattooga County, Georgia, School District, the issue of comparability was raised. Transportation schedules must not be set up so that handicapped children do not receive the same number of hours of instruction as their nonhandicapped peers. In this case, the transportation schedule caused handicapped students to lose one and one-quarter hours of instruction daily. The district agreed to change the bus schedule so that handicapped children will receive the same hours of instruction that nonhandicapped children receive and will spend the least amount of time possible on buses.

Even if the child needs to be transported outside district boundaries to a custodian, the district may have to provide transportation. In Alamo Heights School District v. State Board of Education (1986), the working parent of a severely retarded, multihandicapped boy made unsuccessful efforts to find transportation to a custodian who was located about one mile outside district boundaries. The court found that this was a special circumstance and it was reasonable

for the district to transport the boy to his custodian after school.

Medically Related Services. In 1979, the parents of Amber Tatro brought her special needs to the attention of the schools. At that time she was three and a half years old and attending the early childhood development program. She suffers from myelomeningocele, a birth defect commonly referred to as spina bifida. Her manifestations include speech difficulties, orthopedic impairments, and a neurogenic bladder. She is unable to empty her bladder except by catheterization, which must be done several times per day to prevent kidney damage. The Irving Independent School District refused to provide clean intermittent catheterization (CIC) as a related service under P.L. 94-142. School officials argued that CIC was a medical service rather than a related service. Medical services are provided under P.L. 94-142 only for diagnostic purposes. After six years, the Supreme Court in Irving Independent School District v. Tatro (1984) ruled that CIC is a related service. They found that medical services are distinguishable from related services by who is authorized to provide the service in question. Medical services are those provided by a licensed physician; school health services are related services which can be provided by a school nurse. In fact, the CIC procedure can be performed by nonmedical personnel in a few minutes time and takes about an hour to learn.

In Max M. v. Thompson (1984) and T. G. and P. G. v. Board of Education of Piscataway N. J. (1983), district courts clarified other aspects of the related services issue. They found that psychotherapy was a related service under P.L. 94-142 because it is an essential service designed to allow students to benefit from the educational programs planned for them. It is more important to consider the nature of the related service required than the personnel who may provide the service. Generally, if the service can be provided by someone other than a licensed physician, it is a related service under P.L. 94-142, even if a physician performs the service.

In another case, Los Gatos Joint Union High School v. Doe (1984), it was found that hospitalization to correct a personality disorder was primarily medical rather than educational in nature. The school district was not obligated to pay for the student's residential placement and treatment.

Other Related Services. In Hendrick Hudson District Board of Education v. Rowley (1982), the courts addressed the issue of the scope of related services by stating that related services can be incorporated into an individually designed program to provide educational benefits to the child with handicapping conditions. The intent of relevant legislation, however, is not to require States to maximize the educational potential of a student with handicapping conditions. Legislative intent was to provide an education to these students comparable to that received by their nonhandicapped peers. Amy Rowley is hearing impaired. When she entered first grade, her parents asked the schools to provide Amy with an interpreter so she could gain the most benefit from her education. She was using an FM hearing aid and was receiving deaf education tutoring services and speech

therapy. The schools refused to provide a sign language interpreter on the grounds that she was making satisfactory progress. Because Amy was provided with a reasonable opportunity to learn, her right to an equal educational opportunity was not abridged by the failure to provide an interpreter. In this case, the court ruled that the school was fulfilling its obligation to provide an appropriate education for Amy. This test has become known as the Rowley test and is being applied to help decide current cases.

The Extended School Year

Parents in Armstrong v. Kline (1979) and Battle v. Commonwealth of Pennsylvania (1980) contended that their children were denied an appropriate education because of breaks in programming. During the summer vacation period, certain severely retarded, profoundly retarded, and emotionally disturbed students regressed to the point that the recoupment period needed to relearn the lost skills made it impossible or unlikely that they could attain the state of self-sufficiency that they could otherwise reasonably be expected to reach. This is a denial of appropriate education guaranteed to students with handicapping conditions.

In what has become known as the Armstrong rule, the court found that a free appropriate public education must be provided which meets the unique needs of each child. That education must leave the student as independent as possible within the limits of the handicapping condition. If programming beyond the normal 180 day school year is necessary to achieve the expected degree of self-sufficiency, the schools must provide it. This case was cited to effect summer programming in GARC v. McDaniel (1983), Crawford v. Pittman (1983), Tilton v. Jefferson County Board of Education (1983), and Yaris v. Special School District of St. Louis County (1984). A review of these issues may be found in Browder and Lentz (1985).

Attorney Fees

The American system of jurisprudence is based on an adversarial relationship between the parties. In this spirit there is a winner and a loser. If the loser has denied the winner certain rights guaranteed in civil law, the loser may have to pay the costs associated with the suit. Before the passage of P.L. 94-142 in 1975, it was common practice for the families of students with handicaping conditions to recover the costs of litigation from the losing defendent school districts. From 1975 until 1984, parents and guardians continued to recover legal costs when they prevailed in P.L. 94-142 law suits. A ruling by the U.S. Supreme Court in Smith v. Robinson (1984) reversed this practice. Because there was no provision in P.L. 94-142 allowing parents and guardians to recover legal expenses associated with judicial proceedings, the court decided that an award of attorney's fees is ordinarily precluded.

This ruling made it practically impossible to attain a free appropriate public education for many handicapped students. The costs of effecting the rights of handicapped

students were too great to be borne by those families who prevailed in their lawsuits. In many cases, those families with handicapped children are the people least able to afford costs associated with litigation. To avoid this problem, attorneys resorted to using laws other than P.L. 94-142 to redress grievances. The "old" 14th Amendment arguments for equal protection, the anti-discrimination provisos of P.L. 93-112, the Civil Rights Attorney's Fees Awards Act (142 USC Section 1988), and the damages provisions of the Civil Rights Act of 1964 (42 USC Section 1983) were resurrected, generally to no avail. In Smith v. Robinson, the court said that if remedies which are provided under other laws are provided with more clarity and precision under P.L. 94-142, a plaintiff may not circumvent or enlarge on those remedies, but must use P.L. 94-142 to attain the rights in question. This opinion was supported in Austin v. Brown Local School District (1985), Meiner v. Special School District of St. Louis (1985, 1985), Teresa Diane P. v. Alief Independent School District (1984), Blazejewski v. Board of Education of Allegeny Central School District (1983), Diamond v. McKenzie (1985), Rose v. State of Nebraska (1984), Robideau v. South Colonie Central School District (1985), Hayward v. Thompson (1984), Byrnes v. Riles (1984), and Daniel B. v. Wisconsin Department of Public Instruction (1984). Only if the dispute was outside the purview of P.L. 94-142, could other laws which allowed recovery of attorney fees be used. This had a chilling effect on litigation in this area which clearly was not the intent of Congress when it drafted P.L. 94-142.

In 1985, Congress drafted legislation to amend P.L. 94-142 to allow the awarding of attorney fees to successful plaintiffs. The bill was passed and signed into law as P.L. 99-372, The Handicapped Children's Protection Act of 1986. Even with P.L. 99-372, there is still confusion as to whether additional litigation in State or federal district courts may be necessary to recover the costs of successful litigation under P.L. 94-142. The plaintiffs in the class action suit, J.G. v. Board of Education of Rochester (1986) were granted relief by the U.S. District Court because they had technically exhausted all administrative remedies, i.e., gone through due process proceedings. It is unclear whether administrative officers are empowered to award attorneys fees under P.L. 99-372.

Communicable diseases

In 1957, Jean Arline contracted tuberculosis. She was 13 at the time. The disease went into remission. In 1966, she was hired as a teacher. Once during 1977 and twice during 1978, Ms. Arline suffered relapses. She was dismissed from her job and sought relief under Section 504 of the Rehabilitation Act of 1973. In School Board of Naussau County v. Arline (1987), the court found that the tuberculosis constitutes a handicap under Section 504 because the disease has a physical or mental impairment which substantially limits major life activities. If some reasonable accommodation could be made for her so that she would not be a threat to those around her, she was otherwise

qualified to perform her duties.

Congress amended P.L. 93-112 to exclude from protection those employees with contagious diseases who pose a health threat to others or who are unable to perform job duties. These changes appear in the Civil Rights Restoration Act of 1987 (P.L. 100-259). The legislation has implications for employees with AIDS.

AIDS is considered to be a handicapping condition under Section 504 of P.L. 93-112. In District 27 Community School Board v. Board of Education of the City of New York (1986), the court said that AIDS constituted a handicapping condition under Section 504, was not communicable, but was not a handicapping condition as defined under P.L. 94-142. A due process administrative hearing officer, however, found in the Ryan White case (In re Ryan White, 1985) that AIDS is communicable and that Ryan White was handicapped under P.L. 94-142 as other health impaired.

In subsequent cases, it was found that a school child with AIDS is handicapped under Section 504 (Thomas v. Atascadero Unified High School District, 1987) or likely to be considered handicapped (Doe v. Dolton Elementary School district, 1988). In Chalk v. United States, et al. (1988), the court found that a teacher with AIDS is handicapped under Section 504. The implication is that if an individual with AIDS is able to perform job functions and does not pose a threat to others, then that person is protected under Section 504.

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